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No. 84-1046

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HENRY PARK, FOR UNITED ENTERPRISES, INC.,
Petitioner,

vs.

METRO-GOLDWYN-MAYER/UNITED ARTISTS CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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Petitioner,

VS.

METRO-GOLDWYN-MAYER/UNITED ARTISTS CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit erred in affirming dismissal with prejudice of petitioner's action under Fed.R.Civ.P. 12(b)(6) on the grounds that the action was barred by a release attached to the complaint as an exhibit.

STATEMENT OF THE CASE

On November 8, 1982, petitioner[1] filed this action CR 1[2] for alleged illegal tying of products by respondent United Artists Corporation ("UA"), purportedly in violation of §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1,

[1]The complaint is unclear as to the identity of the plaintiff. Petitioner's pleadings contain references to petitioner both as an individual and a corporate entity. The action purports to be filed by Henry Park for United World Enterprises, Inc., but the injury alleged in the complaint appears to affect a South Korean entity called Dong Hyuep Corporation. For ease of reference, petitioner is referred to herein as "petitioner" or "plaintiff."

[2]"CR" refers to the District Court Clerk's record.

2. Because the complaint was dismissed under Fed.R.Civ.P. 12(b)(6), UA assumes for purposes of this petition that the allegations of the complaint are true. Petitioner alleged that in December, 1979, Dong Hyuep Corporation of South Korea ("Dong"), which was represented in its dealings with UA by Henry Park ("Park"), negotiated with UA for the rights to distribute the film "Rocky II" in South Korea. These negotiations culminated in the execution of a licensing agreement on January 10, 1980.

The complaint alleged that in addition to "Rocky II," UA "induced and persuaded" petitioner to buy the distribution rights to three other films. The basis of petitioner's illegal tying claim was that by "inducing and persuading" petitioner voluntarily to purchase the other three films, UA somehow committed illegal tying. The complaint alleged that petitioner paid UA $450,000 for "Rocky II" and $345,000 for the three other films combined.

Paragraph 16 of the licensing agreement, a copy of which plaintiff attached to the complaint as Exhibit 2, CR 33, provides that "all questions arising hereunder shall be interpreted and governed under and by the laws of the State of New York of the United States of America."

According to the complaint, the South Korean government censored one of the other three films licensed by Dong. Although UA replaced the censored film with another, the replacement film was itself censored, after which the parties allegedly modified the licensing agreement. Pursuant to the alleged modification, UA was to provide petitioner with two films in addition to "Rocky II" and to refund $95,000 of the purchase price petitioner allegedly had paid to UA. Petitioner alleged that UA refused to comply with the amendment and concluded negotiations by offering petitioner an "ultimatum." UA allegedly offered to refund $100,000 to petitioner and to provide no other

films in addition to "Rocky II" or simply to give petitioner no more films and no money.

Petitioner further alleged that in January, 1982, some two years after execution of the licensing agreement, it accepted the $100,000 offered by UA, as shown by a settlement agreement, which plaintiff attached to the complaint as exhibits, CR 63-67. Pursuant to release provisions contained in the settlement agreement, petitioner released UA and its successors from all claims related to or arising out of the licensing agreement and all related negotiations. Exhibits 13 and 15 to the complaint, CR 59-60, 62, among others, showed that throughout negotiation of the settlement agreement petitioner was represented by an attorney.

The release provisions of the settlement agreement are extremely broad, and specifically encompass all claims arising out of the January 10, 1980 licensing agreement. Paragraph 5 of the settlement agreement provides:

> "5. In consideration of the foregoing, Dong, [United] World [Enterprises, Inc.] and Park, and their subsidiaries and affiliates, on behalf of themselves and their respective agents, servants, employees, officers, directors, heirs, successors and assigns (jointly and severally, the 'Releasors'), each *unconditionally releases and discharges each party comprising United [Artists Corporation] and its subsidiaries and affiliates,* and all their respective agents, servants, employees, officers, directors, heirs, successors and assigns (jointly and severally, the 'Releasees'), *from any and all claims,* liabilities, causes of action at law or in equity, and costs whatsoever, *known and unknown, of every nature which Releasors have ever have had or now or in the future may have under the laws of the United States,* South Korea or any other jurisdiction, *arising out of or in connection with any transactions, events, acts or omissions with respect to the* [January

> 10, 1980 licensing] *Agreement, this agreement or any contracts, agreements, understandings or courses of dealing between Releasors on the one hand and Releasees on the other hand.*" (emphasis added)

A short-form release, attached as an exhibit to both the settlement agreement and the complaint, CR 63, provides for release by Dong, United World Enterprises, Inc. and Park of all claims, past, present or future:

> "... arising out of or in connection with that certain [licensing] agreement dated January 10, 1980 between Dong and [UA and all related entities] for the licensing to Dong of certain motion pictures for theatrical exhibition in South Korea or any other contracts, agreements, understandings, or courses of dealing between Dong, World and/or Park on the one hand and [UA and all related entities] on the other hand."

On February 8, 1983, UA moved to dismiss the complaint on the grounds, among others, that the action was barred by the release and that plaintiff had failed to allege any antitrust violation. In its opposition brief, plaintiff sought to contrive an interpretation of its allegations capable of avoiding the release. Among other things, plaintiff asserted a specious claim that the release was "part and parcel" of the alleged illegal tying.[3] Plaintiff also argued that the release was signed under "duress", as purportedly "shown" by allegations that UA had insisted that Henry Park per-

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[3]Petitioner disingenuously asserts (petition ("pet.") at 2, 11) that the district court relied on *Carter v. Twentieth Century Film Corp.*, 127 F.Supp. 675 (W.D. Mo. 1955) in applying the release to bar petitioner's action. As shown, however, by petitioner's own brief in opposition to UA's motion, CR 100, the district court's memorandum order of April 22, 1983, CR 140, and the Ninth Circuit's opinion, petitioner itself relied on *Carter, supra*, as authority for its "part-and-parcel" argument. The district court and the Ninth Circuit held the case inapplicable.

sonally negotiate on behalf of Dong; that Mr. Park had flown several times to New York to negotiate with UA; and that petitioner had negotiated with UA in good faith. CR 102-106.

UA's motion was heard on April 11, 1983. In connection with that hearing, petitioner submitted to the court unsworn, unauthenticated documents in support of its "part-and-parcel" argument. Petitioner also offered unsworn, hearsay statements concerning misconduct by petitioner's former attorney, who had negotiated the settlement agreement for petitioner. Petitioner conceded, however, that such misconduct had occurred in "another matter," and was "irrelevant to this" case. CR 201-209.

By order of April 22, 1983, the district court granted UA's motion and dismissed the complaint with leave to amend within ten days. Because it appeared to the court "highly unlikely" that plaintiff would be able to "allege facts in good faith sufficient to support an allegation" that the release was void or voidable, the court did not address the "many additional defects" it found in the complaint. CR 142.[4]

In its dismissal order, the district court warned plaintiff that failure to amend the complaint within ten days would result in dismissal of the action with prejudice. CR 142. The lack of merit in petitioner's argument that it was denied

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[4]Even apart from the release, the complaint failed to allege an antitrust violation. Plaintiff merely alleged that it was "induced and persuaded" to license the allegedly "tied" films. Plaintiff thus failed to allege the essential element of coercion in its purported illegal tying claim. *Sobrato v. Prudential Insurance Co. of America*, 632 F.2d 786 (9th Cir. 1980). Plaintiff further failed to allege the essential elements of a claim for illegal monopolization. *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 735 (9th Cir. 1979), or even an effect of the purported violation on the commerce of the United States, *National Bank of Canada v. Interbank Association*, 666 F.2d 6 (2d Cir. 1981).

equal protection of the laws (pet. at 12, 19-20), is evident from petitioner's voluntary refusal to amend the complaint, despite a clear invitation to do so. Instead of amending, on May 6, 1983, petitioner filed a motion under Fed.R.Civ.P. 60(b) for reconsideration of the court's April 22 dismissal order. CR 144. That same day the court dismissed the action with prejudice for petitioner's failure to amend. CR 160. Despite UA's arguments that plaintiff's Rule 60(b) motion was procedurally improper, the district court considered the motion on the merits. *See* CR 166, 184-87, 189-91.

The basis for petitioner's motion under Rule 60(b) was that petitioner's former attorney had been convicted of a crime (in connection with an unrelated matter) and disbarred. Petitioner later filed a supplemental memorandum, asserting that when plaintiff executed the release, it did not know its contents. Plaintiff also asserted that its purportedly weak bargaining position somehow constituted fraud in the inducement by UA. Significantly, plaintiff did not adduce any sworn evidence to support any of its loose factual assertions. By order entered June 24, 1983, the district court denied petitioner's motion for reconsideration.

On July 22, 1983, plaintiff noticed an appeal of the dismissal to the Ninth Circuit Court of Appeals. Plaintiff repeated to the Ninth Circuit virtually all of the arguments the district court had rejected, including the purported negligence of its former attorney. Plaintiff also argued that, despite its comprehensive language, the release was not "intended" to apply to antitrust claims.

In addition to responding to plaintiff's other arguments, UA argued to the Ninth Circuit that review of the judgment below was limited to the district court's denial of plaintiff's motion for reconsideration, from which alone plaintiff had timely appealed. The Ninth Circuit, in the interest of justice, rejected this argument and considered plaintiff's ap-

peal from the dismissal order on the merits. On June 14, 1984, after briefing and argument by both sides, the Ninth Circuit affirmed the district court judgment, holding that the release provisions of the settlement agreement barred the action. Plaintiff's petition for rehearing, filed June 22, 1984, was denied by order of September 26, 1984. The mandate of the Court of Appeals was entered on October 24, 1984. On December 26, 1984, plaintiff petitioned this Court for a writ of certiorari. UA received the petition on January 2, 1985.

SUMMARY OF ARGUMENT

The petition for certiorari should be denied because the Court of Appeals correctly held that the release barred petitioner's action.

ARGUMENT

1. Under a Federal Standard or New York Law, the Release Barred Petitioner's Action.

The essence of the judgment below is that the release provisions contained in the settlement agreement by their terms barred petitioner's action, and petitioner failed to present any grounds for voiding the release, either by amended complaint or affidavit. This interpretation of the release was clearly correct, under either a federal common-law standard or New York law.

The release provisions quoted above are clear and comprehensive. Pursuant to Paragraph 5 of the settlement agreement, petitioner released all claims, known or unknown, "arising out of or in connection with" the January 10, 1980 licensing agreement between the parties "or any other contracts, agreements, understandings or courses of dealing between [petitioner] on the one hand and [UA and all related entities] on the other." Paragraph 3 of the

settlement agreement, which refers to the short-form release attached to the agreement as Exhibit C as a "general release", further confirms the parties' intent to enter into a comprehensive release.

The language of the short-form release is itself very broad, encompassing all "contracts, agreements, understandings or courses of dealing" between the parties, specifically including all claims "arising out of or in connection with that certain agreement dated January 10, 1980 between Dong and [UA] for the licensing to Dong of certain motion pictures for theatrical exhibition in South Korea."

Plaintiff's antitrust claim was based entirely on purported illegal tying, which UA allegedly committed solely by means of the licensing agreement. According to the complaint, UA's antitrust violation consisted of "inducing and persuading" petitioner to include in the licensing agreement three other films in addition to "ROCKY II". That the release encompassed plaintiff's purported antitrust claim is thus clear on the face of the settlement agreement.

The release provisions enforced below are substantially identical to those held to bar an antitrust claim in *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1310-12 (5th Cir. 1983), on which the Ninth Circuit relied and which UA cited to the district court. In *Ingram*, the release by its terms applied to " 'all claims and demands whatsoever in law' against the Releasee." At the end of a "long and expansive" description of the claims released, similar to the description in the settlement agreement at issue here, the release in *Ingram* referred specifically to release of all claims arising out of three agreements between the parties, which "in essence amounted to the sale and conveyance of [plaintiff's] assets to [defendant]." As the Fifth Circuit reasoned in applying this general release to bar plaintiff's antitrust claim:

> "The releases thus have both general and specific characteristics, they are general in the same sense that every claim between the parties under the sun, no matter when it arose or whether it has yet arisen, is encompassed by the release. It is specific and thus definitely covers any and all claims which may have arisen or might arise from the sale of Ingram's assets. The sale of assets was Ingram's getting out of the business. Any claim pertaining to the sale of assets *must* be a claim 'arising out of, based upon or in any way relating to' . . . Ingram['s] leaving the business and is therefore encompassed by the releases.
>
> "Ingram's theory is that it was forced to sell its business because of the defendants' antitrust conspiracy. Since this is so, it *must* follow that any damages Ingram sustained because of the sale of its assets, which is the substance of its claim under the Clayton Act, are covered by the releases." (emphasis in original) *Id.* at 1310-11.

The district court and the Ninth Circuit in this case similarly concluded that the "general release" provisions attached to the complaint as exhibits, which specifically encompassed all claims arising out of the January 10, 1980 licensing agreement, barred the purported claims alleged in petitioner's complaint.

In many other cases, federal courts have held that such a general release bars antitrust claims. *See, e.g., Suckow Borax Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F.2d 196 (9th Cir. 1950), *cert. den.*, 340 U.S. 943, 71 S.Ct. 506 (1951); *Redel's, Inc. v. General Electric Company*, 498 F.2d 95 (5th Cir. 1974) [holding release to bar antitrust claims existing as of date of execution]; *Richards Lumber & Supply Co. v. United States Gypsum Co.*, 545 F.2d 18 (7th Cir. 1976), *cert. den.*, 430 U.S. 915, 97 S.Ct.

1326 (1977); *Oskey Gasoline and Oil Co., Inc. v. Continental Oil Co.*, 534 F.2d 1281 (8th Cir. 1976); *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975); *Schott Enterprises, Inc. v. Pepsico, Inc.*, 520 F.2d 1298 (6th Cir. 1975); *Virginia Impressions Products Co. v. SCM Corp.*, 448 F.2d 262 (4th Cir. 1971), *cert den.*, 405 U.S. 936, 92 S.Ct. 945 (1972); *Duffy Theatres, Inc. v. Griffith Consolidated Theatres, Inc.*, 208 F.2d 316 (10th Cir. 1953), *cert. den.*, 347 U.S. 935, 74 S.Ct. 629 (1954). The results in *Ingram* and in this case thus accord fully with federal precedent.

In relying on *Ingram, supra*, the Ninth Circuit seems to have applied a federal rule of decision in interpreting the release. The use of such a federal rule is consistent with the decisions of this Court, *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359, 361, 72 S.Ct. 312, 314 (1951), as well as prior Ninth Circuit decisions. *See Twentieth Century-Fox Film Corporation v. Winchester Drive-In Theaters*, 351 F.2d 925, 928 (9th Cir. 1965), *cert. den.*, 382 U.S. 1011, 82 S.Ct. 620 (1966).

Petitioner's main argument to this Court is that the Ninth Circuit somehow erred in failing to apply petitioner's version of New York law in interpreting the release. Some of the principal deficiencies in petitioner's argument are discussed in subsequent sections of this brief. Even if the courts below were required to apply New York law in interpreting the release, however, the result is the same.

Under New York law the intent of the parties is the "controlling issue" in construing the language of a release. Where such language is clear, "the intent of the parties must be discerned from the writing itself." *Powell v. Oman Construction Co.*, 267 N.Y.S. 2d 862, 25 A.D. 2d 566 (1966). "When the language of the release is clear, effect must be given to the intent of the parties as indicated by the lan-

guage employed." *In the Matter of Schaefer*, 18 N.Y. 2d 314, 274 N.Y.S. 2d 869 (1966). "[U]nless fraud, duress or illegality is established, the language of a voluntary release will be given its full effect." *Coral Gables Imported Motor Cars, Inc. v. Fiat Motors of North America, Inc.*, 673 F.2d 1234, 1238, *mod.* 680 F.2d 105 (11th Cir. 1982), *cert. den.*, 459 U.S. 1104, 103 S.Ct. 727 (1983).

New York courts have held that a release such as that at issue in this case may be applied to bar an action on preliminary motion. In *Teller Paving & Contracting Corp. v. City of New York*, 421 N.Y.S. 2d 364, 72 A.D. 2d 694, *reh.* 423 N.Y.S. 2d 171, 73 A.D. 2d 589 (1979), defendant unsuccessfully moved for summary judgment on the grounds that a release barred the action. The release encompassed "all claims which [plaintiff] may have . . . arising out of the aforesaid contract." Holding this language "clear and to the point," the court reversed the order denying defendant's motion for summary judgment.

In *Powell, supra*, the court held the language of a release providing for discharge of all claims "arising out of or in the course of [plaintiff's] employment" sufficiently clear to allow the court to infer the parties' intent from the language of the release. The court held that such a clearly worded release permitted the entry of summary judgment for defendant on plaintiff's claim for breach of plaintiff's employment contract. Here, the language of the release is at least as clear and comprehensive as those in *Teller* and *Powell*. The application of the release to bar petitioner's action on UA's motion to dismiss thus was entirely consistent with New York law.

2. Under a Federal Standard or New York Law, Petitioner's Purported Ignorance Was Insufficient to Void the Release.

Petitioner argues (pet. at 15) that the release was invalid because Park somehow did not know that he was releasing antitrust claims. As shown by Exhibits 13 and 15 to the complaint, CR 59-60, 62, petitioner was represented by an attorney throughout negotiation of the release. Petitioner therefore cannot argue that the release is void because of its purported ignorance of the terms or effect of the release. *See Link v. Wabash Railroad Company,* 370 U.S. 626, 633-34, 82 S.Ct. 1386, 1390, *reh. den.* 371 U.S. 873, 83 S.Ct. 115 (1962).

Moreover, Paragraph 5 of the settlement agreement specifically provides for the release of all claims, "known and unknown." Both Paragraph 5 and the short-form release attached to the settlement agreement as Exhibit C further provide for release of all claims "of every nature which Releasors ever have had or now or in the future may have."

The *Ingram* court rejected a claim of ignorance so closely similar to petitioner's argument here that the Fifth Circuit's reasoning may almost be applied verbatim:

> "[Petitioner] cannot escape the validity of the releases by merely asserting ignorance of its antitrust claim. Indeed, it may be unaware of many claims existing in its favor. When a release provides that 'any and all claims,' 'past, present, or future' are to be extinguished, a court is required to enforce its provisions both as to known and unknown claims. A contrary result would not contribute significantly to the public policy of encouraging the settlement of differences and compromise of disputes in which the execution and exchange of releases is the common and legally accepted means of consummation." *Id.* at 1312.

The release in this case is even stronger than that in *Ingram*, because it not only covers all possible claims, past, present or future, but specifically includes all claims "known and unknown." Similarly, the clear language of the release is all the courts below needed to consider under New York law. That petitioner may have intended to preserve certain claims is "irrelevant" where, as here, the release is clear on its face. *In the Matter of Schaefer, supra,* 18 N.Y. 2d 314, 274 N.Y.S. 2d 869.

3. Federal Policy Supports Settlement of Antitrust Claims.

Public policy supports the voluntary settlement of disputes, including those involving antitrust claims, without resort to litigation. *Ingram, supra,* 698 F.2d at 1316; *Schott Enterprises, supra,* 520 F.2d at 1300.

Such settlements are worthless unless the parties can rely on an adequately drafted and duly executed release. The release provisions at issue here could not be more comprehensively drafted nor could they more clearly show the parties' intent to effect release of all claims asserted in petitioner's complaint.

Enforcement of such settlement agreements by preliminary motion is especially appropriate in cases such as this.[5] Petitioner had both the opportunity to amend its complaint and a second opportunity on its motion for reconsideration to present sworn evidence of any facts showing that the release was invalid. Petitioner's failure to amend or adduce

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[5]Because the settlement agreement was attached to the complaint as an exhibit, it was properly considered on UA's motion to dismiss. Fed.R.Civ.P. 10(c); *Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 429-30 (9th Cir. 1978). Having pleaded the release, petitioner bore the burden of alleging facts sufficient to avoid its effects, or the action was barred. *Kincheloe v. Farmer*, 214 F.2d 604, 605 (7th Cir. 1954), *cert. den.*, 348 U.S. 920, 75 S.Ct. 306 (1955).

such sworn evidence proves that petitioner's arguments against application of the release were wholly without substance. Trial on the issues of the validity and enforceability of the release would have been a waste of judicial time and the resources of both parties. Application of the release on UA's motion to dismiss thus was entirely appropriate, both in terms of judicial economy and fairness to the parties.

4. The Ninth Circuit Was Not Required to Follow the Precedent of Federal Courts Sitting in New York.

Petitioner's principal argument to this Court is that the Ninth Circuit erred by failing to follow petitioner's peculiar version of New York law in interpreting the release. This argument rests on the initial premise that the choice-of-law provision contained in the January 10, 1980 licensing agreement compelled the courts below to interpret the release under New York law. This premise is incorrect.

The cases are unanimous in recognizing that the release of a federally created right is a matter of federal law. *Dice v. Akron, Canton & Youngstown Railroad Co., supra*, 342 U.S. at 359, 361, 72 S.Ct. at 314; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243-48, 63 S.Ct. 246, 249-52 (1942); *Ingram, supra*, 698 F.2d at 1316 n. 27. The courts are competent in such cases to choose the rule of decision that best effectuates the policy of the relevant federal statutory scheme. *Id.* Such a body of law may consist of "borrowed" state law or an independently derived federal rule. *See* Mishkin, "The Variousness of 'Federal Law'; Competence and Discretion in the Choice of National and State Rules of Decision," 105 *U.Pa.L.Rev.* 797, 799-803 (1957).

Indeed, even those courts that have applied state law in interpreting a release of an antitrust claim have done so on the rationale that although not mandatory, the choice of state law was appropriate because it effectuated federal antitrust policy. *See, e.g., Three Rivers Motors, supra*, 522

F.2d at 888-89. The courts below were therefore free to choose a rule of decision that best furthered federal antitrust policy.

Petitioner's argument rests on a second and equally erroneous premise. Petitioner appears correctly to assert that federal law "controls" the issue of the release. But, by petitioner's logic, the controlling authority is "therefore" the decisions of the federal district and appellate courts sitting in New York. Petitioner's logic is faulty. The courts below were free to exercise their discretion in choosing the rule of decision most consistent with federal policy. *See, e.g., D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U.S. 447, 469, 62 S.Ct. 676, 685 (Jackson, J., concurring), reh. den. 315 U.S. 830, 62 S.Ct. 910 (1942); *Gamewell Mfg., Inc. v. HVAC Supply, Inc.*, 715 F.2d 112 (4th Cir. 1983); 19 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4514 at 263-65 (1982). Contrary to petitioner's second premise, the courts below were not required to follow the decisions of the federal courts sitting in New York.

5. Petitioner Fails to Demonstrate Even That the Release Was Unenforceable Under Its Version of New York Law.

Finally, petitioner's argument that the Ninth Circuit erred in its choice of law only makes sense if petitioner can show that under its version of "New York law," the release was not enforceable on UA's motion to dismiss. Petitioner utterly fails to make any such showing. Petitioner relies on *Novak v. General Electric Corporation*, 282 F.Supp. 1010 (E.D. Pa. 1967), which was decided under New Jersey law and on that ground alone fails to support petitioner's argument. In *Novak*, moreover, the specific language of the release related only to plaintiff's claims arising out of defendant's sale of antifreeze to plaintiff.

The court in *Novak* merely held that under New Jersey law, it could not determine on defendant's motion for summary judgment that the release barred a claim arising out of defendant's sale of headlight lamps to plaintiff.

Similarly, in *Vines v. General Outdoor Advertising Co., Inc.*, 171 F.2d 487 (2d Cir. 1948), the specific release language encompassed only claims for unpaid salary or other compensation due under an employment agreement. Based on this language, the court held that the parties' intent with respect to release of plaintiff's antitrust claim could not be conclusively determined from the face of the release and reversed the district court's order granting summary judgment on plaintiff's antitrust claim.

Likewise, in *Walder v. Paramount Publix Corporation,* 132 F.Supp. 912 (S.D.N.Y. 1955), plaintiffs' antitrust claim was based on an alleged conspiracy among defendants to deprive plaintiffs' theater of first-run films and subsequent-run films on a competitive basis. An agreement between defendant and two of the plaintiffs provided for release of all claims, including those related to the " 'Tivoli Theatre and its equipment.' " The court denied defendants' motion for summary judgment on plaintiffs' antitrust claim, again on the grounds that the intent of the parties with respect to the antitrust claim was not clear on the face of the release.

In each of these cases, the specific release language suggested that the release might not encompass the claim defendants sought to bar by motion for summary judgment. In this case, by contrast, even the "specific" release language encompasses all claims "arising out of or in connection with any transactions, events, acts or omissions with respect to the [licensing] Agreement, this [settlement] agreement, or any other contracts, agreements, understandings or other courses of dealing between Releasors on

the one hand and Releasees on the other hand." There can be no question that this language encompasses the claims asserted in the complaint. *Novak, Vines,* and *Walder* are therefore inapplicable here.

Finally, petitioner relies on *Michael Rose Products, Inc. v. Loews, Inc.,* 141 F.Supp. 257 (S.D.N.Y. 1956) as "controlling" authority for the purported unenforceability of the release on UA's motion to dismiss. Space limitations preclude a full discussion of this case. Briefly, however, *Michael Rose* is inapplicable here for the following reasons:

1. In *Michael Rose,* plaintiff submitted a sworn affidavit, from which the court inferred the possibility of mutual mistake in the formation of the release agreement. Here, petitioner failed to provide the district court with any sworn evidence whatsoever of facts suggesting that the release was unenforceable.

2. The amount of money paid for the release in *Michael Rose* was identical to the amount of damages plaintiff claimed in a separate, pending action. The court relied in part on this evidence in finding a possibility that the release was intended to relate solely to plaintiff's claim in that action. No such circumstances are present here. *Michael Rose,* like the other cases on which petitioner relies, is simply inapposite.

CONCLUSION

For the reasons set forth above, UA respectfully urges this Court to deny the petition for certiorari.

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Respectfully submitted,

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